IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1241 of 1994

For Approval and Signature:

THE HON'BLE MISS JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHOMEDSIDDIQUE ABDULLAMIYAN & 6 - Petitioner(s)

Versus

SARALABEN CHANDRAKANT SHAH & 6 - Respondent(s)

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Appearance :

MR JITENDRA M PATEL for Petitioner No(s).: 1,3,4,5,6.
MR SURESH M SHAH for Respondent No(s).: 1 - 1.

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CORAM :THE HON'BLE MISS JUSTICE R.M.DOSHIT

Date : 29/06/2005

ORAL JUDGMENT

Feeling aggrieved by the judgment and order dated 7th May, 1994 passed by the learned Extra Assistant Judge, Vadodara in Regular Civil Appeal No.257/1985, the respondents (plaintiffs in Rent Suit No.316/1978) have preferred the present Revision Application under Section

29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as, "**the Rent Act**").

The plaintiffs are the owners of the building bearing Municipal Census No.F-197 situated at Vadodara. The shops nos.1,2 and 3 and the godown at the rear of the shops were leased to the defendant Chandrakant Chimanlal Shah for a monthly rent of Rs.70=00. The plaintiffs instituted Rent Suit No.316/1978 in the Court of Small Causes, Vadodara for recovery of the suit premises on the grounds that the godown at the rear of the suit shops was unlawfully sublet by the defendant to his brother one Ramanlal Shah and that the defendant had raised permanent structure in the suit premises. Pending the suit the said defendant passed away. His heirs and legal representatives, the widow, the daughters and the son were substituted as defendants. In view of the death of the defendant Chandrakant Shah, the plaintiff raised issue regarding transmission of tenancy under Section 5(11)(c)(ii) of the Rent Act. The suit was contested by the heirs of the deceased defendant Chandrakant Shah vide written statements Exhs.25 and 52. It was stated that the

wife of the deceased defendant Saralaben and the daughter Ritaben and the son Dipak were attending the business during the life time of the deceased tenant. After the demise of the tenant the said defendants continued the business in the suit premises. The tenancy right in the suit premises stood transmitted to the family of the deceased tenant as envisaged by Section 5(11)(c)(ii) of the Rent Act.

The learned trial Judge allowed the suit by judgment and decree dated 23rd September, 1985 and passed decree for possession in favour of the plaintiffs. The learned trial Judge, considering the evidence on record, held that none of the members of the family of the deceased Chandrakant was carrying on business with the deceased tenant at the time of his death. The tenancy right of the deceased defendant, therefore, would not devolve upon the family of the deceased tenant as envisaged by Section 5(11)(c)(ii) of the Rent Act. The learned trial Judge also held that part of the suit premises the suit godown was unlawfully sublet to the aforesaid Shri Ramanlal. The plaintiffs were, therefore, entitled to a decree for eviction.

Feeling aggrieved, the defendants preferred Regular Civil Appeal No.257/1985 in the Court of District Judge, Vadodara. The learned Assistant Judge, by judgment and order dated 7th May, 1994, allowed the Appeal and quashed the decree for possession passed by the trial Court. The lower appellate Court was pleased to hold that the question of transmission of tenancy after the demise of the deceased tenant was required to be considered by the learned trial Judge at the threshold i.e before the trial began. The learned trial Judge, however, decided the said issue at the end of the trial along with the other issues and not before the commencement of the trial. The procedure adopted by the learned trial Judge was illegal. The finding recorded by the learned trial Judge was accordingly vitiated. The lower appellate Court also held that the wife, the daughters and the son of the deceased tenant were indeed carrying on the business during the life time of the deceased tenant. On demise of the deceased tenant the tenancy, therefore, should devolve upon the family of the deceased tenant. As to the subletting, the lower appellate Court reversed the finding of the trial Court and held in favour of the

defendants. The lower appellate Court confirmed the finding with respect to the erection of permanent structure in favour of the defendants.

Mr.Patel has submitted that the approach of the lower appellate Court and the finding recorded are totally perverse and unsustainable. He has submitted that the lower appellate Court has committed grave error in holding that the question as to the transmission of tenancy under Section 5(11)(c) of the Rent Act was required to be decided before the suit was tried. He has also submitted that the finding recorded by the lower appellate Court that the family members of the deceased tenant i.e the wife and the children were helping the deceased tenant in his business and that they had continued the business after his death is not supported by evidence on record. He has submitted that the finding recorded by the lower appellate Court that the suit premises was leased for the family of the original tenant Chunilal Kapoorchand and that the presence of the aforesaid Ramanlal in the suit godown did not amount to subletting is perverse and requires to be quashed and

set-aside. He has relied upon the Full Bench judgment of this Court in the matter of **Babubhai @ Jayantilal Kalyanbhai & Ors. V/s. Shah Bharatkumar Ratilal & Ors. [21 GLR 103].**

The Revision Application is contested by Mr.Shah. He has supported the judgment of the lower appellate Court and has submitted that the Revision Application requires to be dismissed. He has submitted that the right to tenancy is inheritable right. The right to tenancy in the suit premises, therefore, shall devolve upon the heirs of the deceased tenant in accordance with the Hindu Succession Act. In the alternative, he has submitted that the matter be remanded to the trial Court for decision with respect to the transmission of tenancy under Section 5(11)(c) of the Rent Act.

I do agree with Mr.Patel. In the matter of Babubhai @ Jayantilal Kalyanbhai & Ors (supra) the proposition that, "**the landlord has to move the Court for declaration as to who should be treated as a transmitted tenant. But before this decision is made by the Court, no further action can be taken by the landlord and any action before**

taking proper proceedings as contemplated by sec.5(11)(c)(i) would be premature and must fail, and unless the Court determines as to who is a transmitted tenant, no liability to pay rent would arise and consequently, therefore, a statutory notice as contemplated under sec. 12, which is a condition precedent to initiate the eviction proceedings on the ground of arrears of rent, can be served since it is the primary duty of the landlord to get this question of transmission of tenancy determined one way or the other" did not find favour with the Full Bench. According to the Full Bench such course of action was not only unwarranted under the Act and the Rules but would be detrimental to the interest of the causes of the landlords as well as tenants. According to the Full Bench the right course of action should be, "**the Court concerned should stay the suit or the proceeding, as the case may be, and direct the parties to get the question as to who is the successor tenant determined by appropriate proceedings. If both the parties before the Court agree that that question may be determined in the suit or the proceeding itself, the Court can equally decide that question.**" In the present case, the

contractual tenancy was terminated by the plaintiffs under the suit notice. Therefore, on the date of the suit the deceased defendant was a statutory tenant. The defendant tenant died pending the suit. His heirs and legal representatives were brought on the records in accordance with law. Since the suit premises was let for business, the question arose upon whom the tenancy shall devolve and who shall be the tenant as envisaged by Section 5(11)(c)(ii) of the Rent Act. Pending the suit the trial Court framed an additional issue in respect of the transmission of tenancy. The parties led evidence and the trial Court, considering the evidence on record, held that none of the members of the family of the deceased tenant was carrying on business with the deceased tenant at the time of his death. The tenancy would, therefore, not devolve upon any of the said members of the family of the deceased tenant. In my view both the parties had tacitly agreed that the question of successor tenant be decided by the trial Court in the pending suit. As held by the Full Bench in the above judgment, such a course of action was legal and proper. The decision of the trial Court, therefore, would not be vitiated for want of adherence to the legal and proper procedure. The lower

appellate Court has manifestly erred in holding that the procedure adopted by the trial Court was illegal and contrary to the aforesaid judgment of the Full Bench.

Section 5 (11) defines the term “tenant”. Clause (c) thereof defines the term “tenant” where the tenant has died. Sub-clause (i) thereof refers to the premises let for residence and sub-clause (ii) refers to the premises let for business, trade or storage and reads as under :

> **“in relation to premises let for business, trade or storage, any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage as the case may be, in the said premises and as may be decided in default of agreement by the Court.”**

Hence, with respect to the premises let for business, trade or storage, the successor tenant would be a member of the tenant's family carrying on business, trade or

storage with the tenant in the leased premises at the time of the death of the tenant and who after the death of the tenant continues to carry on the business in the said premises. In the present case, the members of the family of the deceased defendant Chandrakant Shah were impleaded as the defendants. The said defendants filed written statements Exhs.25 and 52. In written statement Exh.25 it was stated that Saralaben i.e wife of the defendant, and Ritaben and Rajeshriben (the daughters of the tenant) used to help the defendant in his business and since his death they were carrying on the business. In written statement Exh.52 it has been stated that on the death of the defendant the tenancy had devolved upon all his heirs and that they were carrying on business after the death of the defendant tenant. However, none of the said heirs came forth to give oral evidence before the Court. The only oral evidence led by the defendants was that of Ramanlal, the brother of the deceased defendant. The said Ramanlal deposed on behalf of Saralaben, the wife of the deceased defendant, as her constituted attorney. With respect to the devolution of tenancy he deposed that the deceased tenant was suffering for two months before his death and that during the said

period Saralaben and Ritaben attended the business. Since the death of the tenant, his wife Saralaben and daughters Rajeshriben and Ritaben were carrying on the business. The plaintiff in his oral evidence denied that anybody but the deceased plaintiff was carrying on business in the suit premises. He examined one Bhagwandas Gopaldas. The said witness Bhagwandas was a tenant in the rooms above the suit shops for more than 40 years. He was residing in the said rooms since his birth. He was familiar with the suit shops. He deposed that the deceased defendant alone was carrying on the business in the suit shops and that he had attended business till the day he died. None of the family members of the deceased tenant was ever seen in the suit shops prior to or after the death of the deceased tenant. The plaintiff also examined one Bharatkumar Ravjibhai. The said witness Bharatkumar deposed that he was trading in cotton and nylon threads. He used to buy the stock from the shop of Ramanlal, the brother of the deceased tenant. He knew the deceased tenant. He further stated that the deceased tenant alone was carrying on business in the suit shops and that since his death, Nitinbhai, the son of the aforesaid Ramanlal was carrying on the business in the

suit shops. He stated that none of the family members of the deceased tenant was ever seen in the suit shops. Considering all these and other oral and documentary evidence, the learned trial Judge held that, "**none of the heir or family member of defendant no.1 is qualified to be the successor tenant of the suit premises, after death of deceased tenant Chandrakant, under Section 5(11)(c)(ii) of the Bombay Rent Act.**" The lower appellate Court, as recorded herein above, held that the procedure adopted by the trial Court was not correct and the judgment was, therefore, vitiated. However, the lower appellate Court, considering the documentary evidence Exhs.95, 123, 124, 133, 135, 136 and 137, held that, "**all these documents are sufficient to show that the defendants were doing in premises along with deceased tenant Chandrakant and after his death present defendants are doing business and they have continued the said business onward after death of Chandrakant and therefore considering all material on record I come to the conclusion that at present for the suit premises defendant Sarlaben widow of Chandrakant Chunilal is the qualified family member of deceased Chandrakant, who was doing business with her husband, when he was alive and she continued the said business**

after death of Chandrakant. Hence, in view of all these evidence, Ld.Trial Judge ought to have held that defendants are successor tenants of the suit premises u/s.5(11)(c)(ii) of the Bombay Rent Act and amongst these tenants Sarlaben is qualified or classified successor tenant, upon whom all tenancy rights devolve or she gets the tenancy rights in heritance." Document Exh.95 is the registration certificate dated 6th January, 1982 issued under the Gujarat Sales Tax Act in the name of minor Dipakkumar Chandrakant Shah. Exhibit 123 is the application for license made under the Shops and Establishment Act by the deceased tenant on 8th December, 1980. Exhibit 124 is a similar application made on 14th December, 1983 by the aforesaid Saralaben in the name of minor Dipakkumar. Exhibit 133 is the agreement between the aforesaid Saralaben and one Mukesh Ramanlal Shah that the said Mukesh shall carry on the business in the suit premises on behalf of the said Saralaben. Exhibit 135 is the certificate dated 13th January, 1985 issued by the President of the Navabazar Cloth Merchants' Association, Baroda certifying that since the death of its member Chandrakant Shah the business was carried on by his widow Saralaben in the name of minor Dipakkumar. Documents

Exh.136 are the verification certificates issued by the Inspector of Weights and Measures in the name of deceased Chandrakant Shah. Exhibit 137 is the license issued under the Shops and Establishment Act and renewed after the death of the tenant in the name of minor Dipakkumar. None of the aforesaid documents even remotely establish that at any time before the death of the tenant Chandrakant Shah any of the members of his family ever attended the business much less carried on the business. On the contrary, it has come on record that at the time of the death of the deceased tenant three of his daughters and the son were minor. The finding recorded by the lower appellate Court in favour of the defendants is totally unsupported by the evidence on record and is also self-contradictory. In my view, the plaintiffs succeeded in establishing that none of the family members of the deceased Chandrakant Shah was carrying on business with him at the time of his death. In my view, therefore, right to tenancy shall not devolve upon any of the members of the family of the deceased tenant. As to the succession under ordinary law of succession, it has been held by this Court and the Hon'ble Supreme Court that if a statute confers the right to tenancy it can as well

impose restriction on such rights. It has been held that, **"...As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be enjoyed. If the Legislature makes any provision in the Act limiting or restricting the benefit and the nature of the protection to be enjoyed in a specified manner by any particular class of heirs of the deceased tenant on any condition laid down being fulfilled, the benefit of the protection has necessarily to be enjoyed on the fulfillment of the condition in the manner and to the extent stipulated in the Act. The Legislature which by the Rent Act seeks to confer the benefit on the tenants and to afford protection against eviction is perfectly competent to make appropriate provision regulating the nature of protection and the manner and extent of enjoyment of such tenancy rights after the termination of**

contractual tenancy of the tenant including the rights and the nature of protection of the heirs on the death of the tenant" [AIR 1985 SC 796]. In the present case, right to inherit tenancy is restricted to the class of heirs mentioned in Section 5(11)(c)(ii) of the Rent Act. As discussed herein above, none of the members of the family of the deceased defendant (the present respondents) had a right to inherit the tenancy.

As to the subletting of the suit godown to the aforesaid Ramanlal, I do agree with the lower appellate Court that neither the panchnama Exh.119 nor the oral evidence given by the witness of the plaintiff proves that the suit godown was used by the aforesaid Ramanlal or that the deceased defendant had parted with the possession of the suit godown in favour of the said Ramanlal to the exclusion of himself. As to the raising of permanent structure, both the Courts below have recorded concurrent finding against the plaintiffs. Learned advocate Mr.Patel has not made out a case for interference.

In view of the above discussion, the plaintiffs are

not entitled to recovery of possession of the suit premises on the grounds that the deceased defendant had unlawfully sublet the suit godown to the aforesaid Ramanlal or that the deceased defendant had raised a permanent structure in the suit premises without the consent of the plaintiffs. However, as observed herein above, the suit premises having been let for business and storage, the devolution of tenancy would be governed by Section 5(11)(c)(ii) of the Rent Act. As held herein above, none of the heirs of the deceased tenant was carrying on business with the deceased tenant at the time of his death and, therefore, none of them shall inherit the right of tenancy of the deceased defendant and the tenancy should revert back to the plaintiffs. Besides, the agreement Exh.137 proves that even after the death of the deceased tenant his wife and children were unable to carry on the business in the suit premises and one Mukesh Ramanlal was engaged to carry on the business. Evidently, since the death of the deceased tenant the defendants have parted with the possession of the suit premises in favour of the said Mukesh Ramanlal. The agreement is but a subterfuge to cloak the transfer of the suit premises.

In view of the above discussion, the Revision Application is allowed to the extent that the tenancy shall revert back to the plaintiffs and the plaintiffs shall be entitled to recovery of possession of the suit premises. The judgment and order of the lower appellate Court is quashed and set-aside to that extent. The decree for possession passed by the trial Court is restored. Rule is made absolute accordingly. The parties shall bear their own cost.

(**Ms. R.M.Doshit, J.**)

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